

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOSE LUIS GARCIA,

Defendant-Movant,

v.

UNITED STATES OF AMERICA,

Plaintiff-Respondent.

Case No.: 10-cr-4247-BTM-6

**ORDER DENYING
DEFENDANT'S MOTION FOR
REDUCTION OF SENTENCE**

[ECF NO. 336]

Defendant Jose Luis Garcia ("Defendant"), appearing pro se, has filed a motion for reduction of sentence pursuant to 18 U.S.C. § 3582. For the reasons discussed below, Defendant's motion will be denied.

I. BACKGROUND

On April 12, 2011, pursuant to a plea agreement, Defendant pled guilty to one count of conspiracy to distribute 50 grams and more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. See Plea Agreement (ECF No. 136); Findings and Recomm. of Magis. Judge Upon a Plea of Guilty (ECF No. 137); Order Accepting Guilty Plea (ECF No. 155). The plea agreement stipulated that for purposes of the Sentencing Guidelines, the drug type and quantity involved in the conspiracy was "at least 150 grams of methamphetamine (actual)." Plea Agreement ¶ II.B.6.

1 On August 26, 2011, the Court sentenced Defendant to a 132-month term of
2 imprisonment. J. in a Crim. Case (ECF No. 221). In calculating Defendant's
3 sentence pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 2D1.1(c)
4 (Drug Quantity Table), the Court applied a base offense level of 34, the base
5 offense level associated with "at least 150 G but less than 500 G of
6 Methamphetamine (actual)." Crim. J. Statement of Reasons § III. It reduced the
7 base offense level by 3 levels for acceptance of responsibility under U.S.S.G.
8 § 3E1.1(b), for a resulting offense level of 31. Id. Defendant's criminal record put
9 him in a Criminal History Category of V. Id.; Presentence Report at 6 (ECF No.
10 182). The Guideline range associated with an offense level of 31 and Criminal
11 History Category of V was 168-210 months. See U.S.S.G. Sent. Table (Nov. 1,
12 2010). The Court found this sentencing range greater than necessary to effect the
13 purposes of 18 U.S.C. § 3553(a), and accordingly granted a downward variance
14 of 36 months under § 3553(a)(1), resulting in the imposed term of imprisonment of
15 132 months. Crim. J. Statement of Reasons § VI; J. in a Crim. Case (ECF No.
16 221). Judgment was entered on August 31, 2011. See J. in a Crim. Case.

17 On May 22, 2015, Defendant filed a motion for reduction of sentence
18 pursuant to 18 U.S.C. § 3582(c)(2). Def.'s § 3582(c)(2) Mot. for Reduction of Sent.
19 (ECF No. 311). Section 3582(c)(2) provides:

20 in the case of a defendant who has been sentenced to a term of
21 imprisonment based on a sentencing range that has subsequently
22 been lowered by the Sentencing Commission pursuant to 28 U.S.C.
23 994(o), upon motion of the defendant ... the court may reduce the term
24 of imprisonment, after considering the factors set forth in section
25 3553(a) to the extent that they are applicable, if such a reduction is
26 consistent with applicable policy statements issued by the Sentencing
27 Commission.

28 18 U.S.C. § 3582(c)(2). Defendant sought a sentence reduction based on
Amendment 782 to U.S.S.G. § 2D1.1, which, effective November 1, 2014, lowered
the applicable sentencing ranges for most drug offenses by two offense levels.

1 On July 29, 2015, the Court issued an order denying the motion. (ECF No.
 2 330.) Pursuant to the policy statement in U.S.S.G. § 1B1.10, the extent to which
 3 defendants qualify for sentence reductions based on retroactive application of
 4 certain amendments to the Guidelines, including Amendment 782, is limited in that
 5 a court may not reduce a defendant's sentence to a term less than the low end of
 6 the amended Guideline range, which must be calculated without regard to any
 7 departure or variance the defendant originally received, other than one for
 8 substantial assistance under § 5K1.1. U.S.S.G. § 1B1.10(b)(2)(A) & cmt. n. (1)(A),
 9 (3) (Nov. 1, 2014). The Court denied Defendant's motion based on the
 10 determination that his original sentence of 132 months was lower than the
 11 amended Guideline range of 140-175 months that would apply to his case
 12 pursuant to Amendment 782, calculated, as required by § 1B1.10, without regard
 13 for the original 36-month downward variance, making him ineligible for a sentence
 14 reduction pursuant to § 1B1.10. See Order Re: Mot. for Sent. Reduction Pursuant
 15 to 18 U.S.C. § 3582(c)(2).

16 **II. ANALYSIS OF DEFENDANT'S MOTION**

17 On January 6, 2017, Defendant filed this, his second motion for reduction of
 18 sentence pursuant to 18 U.S.C. § 3582. Mot. for Reduction of Sent. Pursuant to
 19 Title 18 U.S.C. § 3582 ("Def.'s Mot.").¹ He argues that the Drug Quantity Table set
 20 forth in U.S.S.G. § 2D1.1(c), which assigns base offense levels based on the type
 21 and amount of drugs involved in an offense, has been applied to his case
 22 incorrectly. Specifically, he contends that under § 2D1.1(c), both as it existed at
 23 the time he was sentenced, and after it was altered by Amendment 782, his
 24 sentence should have been calculated using the base offense level associated
 25 with "at least 50 G [grams] but less than 150 G of Methamphetamine (actual)"

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 27
 28 ¹ Unlike 28 U.S.C. § 2255, 18 U.S.C. § 3582 does not impose a jurisdictional bar on a second motion. United
States v. Trujillo, 713 F.3d 1003, 1006 (9th Cir. 2013).

1 rather than the higher base offense level associated with “at least 150 G but less
 2 than 500 G of Methamphetamine (actual).” Def.’s Mot. at 1-2.

3 Defendant’s motion is somewhat difficult to interpret, but it was filed pro se,
 4 and prisoner pro se pleadings are given the benefit of liberal construction.
 5 Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L. Ed. 2d 1081 (2007)
 6 (per curiam) (“A document filed pro se is to be liberally construed”); Corjasso v.
 7 Ayers, 278 F.3d 874, 878 (9th Cir.2002) (“Pro se habeas petitioners may not be
 8 held to the same technical standards as litigants represented by counsel.”).

9 Liberally construed, Defendant’s motion appears to assert two possible
 10 grounds for relief. First, Defendant may be contending that the Court erred when
 11 it denied his first motion for sentence reduction under Amendment 782. Def.’s Mot.
 12 at 2. Although he does not explain the argument in so many words, his motion can
 13 be read as contending that if the Court had applied what he contends is the correct
 14 base offense level, that is, the one associated with “at least 50 G [grams] but less
 15 than 150 G of Methamphetamine (actual),” under Amendment 782 a base offense
 16 level of 30 would apply, and his resulting sentencing range would be 120-150
 17 months²-- which falls below his original sentence of 132 months, making him
 18 potentially eligible for a sentence reduction under § 1B1.10 and § 3582. See
 19 U.S.S.G. § 1B1.10(a)(2)(B) (Nov. 1, 2014) (reduction in term of imprisonment not
 20 authorized under § 3582(c)(2) where the amendment does not have the effect of
 21 lowering the defendant’s applicable guideline range), cmt. n. (1)(A) (for purposes
 22 of determining eligibility for sentence reduction, amended guideline range must be

24
 25 Pursuant to the § 1B1.10 policy statement, defendant’s sentencing range under Amendment 782 would then be
 26 calculated as follows, assuming a base offense level of 30 applied: **30** (base offense level, U.S.S.G. §
 27 2D1.1(c)(5) (Nov. 1, 2014)) -**3** (acceptance of responsibility, U.S.S.G. § 3E1.1(b))= **27** (adjusted offense level).
 28 Defendant’s criminal history category, which he does not challenge, would remain at **V**. The resulting sentencing
 range would be **120-150 months**. Defendant contends that since he originally received a downward variance of
 36 months under 18 U.S.C. § 3553(a), that time should be subtracted from his sentencing range. He is incorrect.
 When comparing a defendant’s sentence under an amended Guideline, courts are not to include any departure or
 variance that was originally granted (other than one for substantial assistance under § 5K1.1). U.S.S.G. 1B1.10
 cmt. n. 1(A), 3.

1 determined without consideration of any departure or variance); United States v.
 2 Gonzalez, 119 F. Supp. 3d 1266, 1267 (S.D. Cal. 2015).

3 Assuming this to be Defendant's point, the argument fails for the simple
 4 reason that Defendant is incorrect in his understanding of how the base offense
 5 levels under § 2D1.1(c) apply to his case. He appears to believe that the drug
 6 amount in his indictment controls. Count one in the indictment, the charge to which
 7 he pled guilty, charged him with conspiracy to distribute "50 grams and more of
 8 methamphetamine (actual)." Indictment at 1-2 (ECF No. 1); Plea Agreement ¶ 1.
 9 This appears to be the basis for his argument that he should be sentenced using
 10 the base offense level that §2D1.1(c) assigns to "at least 50 G but less than 150 G
 11 of Methamphetamine (actual)," which would result in a lower base offense level.
 12 Defendant is incorrect in believing this to be the case, however, because although
 13 the drug weight in the indictment is relevant to determining the statutory maximum
 14 sentence to which a defendant is exposed, United States v. Buckland, 289 F.3d
 15 558, 568 (9th Cir. 2002) ("drug quantity and type, which fix the maximum sentence
 16 for a conviction ... must be charged in the indictment"), it is not the end of the
 17 inquiry for sentencing purposes. A sentencing court can rely on facts admitted by
 18 a defendant for purposes of applying the Guidelines. United States v. Booker, 543
 19 U.S. 220, 244 (2005) ("Any fact (other than a prior conviction) which is necessary
 20 to support a sentence exceeding the maximum authorized by the facts established
 21 by a plea of guilty or a jury verdict must be admitted by the defendant or proved to
 22 a jury beyond a reasonable doubt"). Here, Defendant admitted in the plea
 23 agreement that "[t]he entire conspiracy involved at least 150 grams of
 24 methamphetamine (actual)." Plea Agreement ¶ II.B.6 (emphasis added). Because
 25 he admitted the drug weight involved in the offense of conviction was "at least 150
 26 grams," id., the applicable base offense level under § 2D1.1(c) is the one that
 27 corresponds to "at least 150 G [grams] but less than 500 G of Methamphetamine
 28 (actual)." See U.S.S.G. § 2D1.1(c)(4) (Nov. 1, 2014). Post-amendment 782,

1 § 2D1.1(c) assigns a base offense level of 32 to this drug quantity. Id. The
 2 resulting offense level, when calculated as required by the § 1B1.10 policy
 3 statement (that is, taking into account the 3-level reduction for acceptance of
 4 responsibility, but without regard for the original 36-month downward variance), is
 5 offense level 29.³ With a Criminal History Category of V and a resulting offense
 6 level of 29, Defendant's sentencing range under Amendment 782 would be 140-
 7 175 months. Since this range is higher than his originally-imposed sentence of
 8 132 months, he is ineligible for a sentence reduction under § 1B1.10. This is the
 9 sentencing range the Court calculated when it denied Defendant's first motion for
 10 a sentence reduction, so it did not err in calculating Defendant's base offense level
 11 under Amendment 782. Thus, Defendant's first possible argument for a sentence
 12 reduction, as the Court understands it, is not a meritorious one.

13 Next, Defendant's motion can also be read as making the argument that his
 14 original sentence was imposed erroneously using the wrong base offense level
 15 under § 2D1.1(c). If this is an argument he means to assert, it is not available to
 16 him under § 3582(c)(2), since it is not based on an amendment to the Guidelines,
 17 but it is a claim cognizable in the context of a motion to vacate, set aside, or correct
 18 his sentence under 28 U.S.C. § 2255. See 28 U.S.C. § 2255(a); Lorentsen v.
 19 Hood, 223 F.3d 950, 953 (9th Cir. 2000) (“In general, § 2255 provides the exclusive
 20 procedural mechanism by which a federal prisoner may test the legality of
 21 detention” (citation omitted)).

22 Since Defendant did not file this motion under § 2255, the Court would have
 23 to recharacterize it as a § 2255 motion to consider the merits of what the Court
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25
 26 ³ Pursuant to the § 1B1.10 policy statement, defendant's sentencing range under Amendment 782 is calculated
 27 as follows: **32** (base offense level, U.S.S.G. § 2D1.1(c)(4) (Nov. 1, 2014)) **-3** (acceptance of responsibility,
 28 U.S.S.G. § 3E1.1(b)) =**29** (adjusted offense level). Defendant's criminal history category remains at **V**. The Court
 does not consider its original 36-month downward variance because § 1B1.10 instructs it not to do so. U.S.S.G.
 1B1.10 cmt. n. 1(A), 3. Accordingly, Defendant's sentencing range, under an adjusted offense level of 29 and
 criminal history category V, is **140-175 months**.

1 sees as his second possible argument. However, it declines to do so here. In
 2 some situations, district courts may “ignore[] the legal label attached” to a
 3 prisoner’s pro se motion and recharacterize it as a § 2255 motion “to create a better
 4 correspondence between the substance of the motion’s claim and its underlying
 5 legal basis.” Castro v. United States, 540 U.S. 375, 381-82 (2003). A district court
 6 is not required to recharacterize a pro se motion as a § 2255 motion, but “may do
 7 so in order to avoid an unnecessary dismissal.” Id. If a district court does decide
 8 to recharacterize a pro se prisoner’s motion as a § 2255 motion, it must first give
 9 the prisoner notice of the potential adverse consequences of doing so, and either
 10 obtain his consent or offer him the opportunity to withdraw the motion. United
 11 States v. Seesing, 234 F.3d 456, 464 (9th Cir. 2001). If these steps are not
 12 followed, a recharacterized motion will not count as a § 2255 motion for purposes
 13 of applying § 2255’s prohibition on “second or successive” petitions. Castro, 540
 14 U.S. at 377.

15 Here, the Court will refrain from recharacterizing Defendant’s motion as a
 16 § 2255 motion because doing so would not help “avoid an unnecessary dismissal.”
 17 Castro, 540 U.S. at 382. Recharacterization is meant to benefit the prisoner,
 18 Seesing, 234 F.3d at 463, and makes sense when it serves the goal of avoiding
 19 unnecessary dismissal of a potentially valid claim. See Castro, 540 U.S. at 381.
 20 Construing a motion as a § 2255 motion serves no constructive purpose when it is
 21 clear, as it is here, that the converted motion would be subject to summary
 22 dismissal, effectively wasting what might be the prisoner’s only opportunity to seek
 23 relief under § 2255. See United States v. Gonzalez-Albaran, 2007 U.S. Dist.
 24 LEXIS 59343, *7 (S.D. Cal., Aug. 13, 2007) (declining to recharacterize pro se
 25 submission as § 2255 petition because of the “procedural implications of doing
 26 so”).

27 To explain why recharacterization under § 2255 would be fruitless here, first,
 28 the recharacterized motion would almost certainly be time-barred. Unless there

1 are facts supporting tolling of the limitations period, a motion pursuant to § 2255
2 must be brought within one year from “the date on which the judgment of conviction
3 becomes final.” 28 U.S.C. § 2255(f)(1). Here, judgment was entered on August
4 31, 2011, and because Defendant did not pursue a direct appeal, his judgment
5 became final on September 14, 2011, when the 14-day period for filing a notice of
6 appeal expired. See United States v. Young, 2014 U.S. Dist. LEXIS 133530 (D.
7 Alaska Sept. 3, 2014) (“The Court is persuaded that the Ninth Circuit would follow
8 the Second, Third, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits” in
9 holding that for purposes of § 2255(f)(1), an unappealed criminal judgment
10 becomes final when the time for filing a notice of appeal expires) (case citations
11 omitted). As the grounds on which Plaintiff’s current motion challenging his
12 sentence were known at the time he was sentenced, there are no grounds the
13 Court can conceive to support tolling, so Defendant’s deadline for pursuing the
14 instant relief via a § 2255 motion elapsed on September 14, 2012. Since this
15 motion was not filed until January 6, 2017, if it were recharacterized under § 2255,
16 it would almost certainly be time-barred.

17 Also, construing Defendant’s motion as a § 2255 motion would be fruitless
18 because it is clear it is substantively meritless and would be subject to summary
19 dismissal upon recharacterization. See Baumann v. United States, 692 F.2d 565,
20 571 (9th Cir. 1984) (§ 2255 motion may be subject to summary dismissal “if it
21 plainly appears from the face of the motion and any annexed exhibits and the prior
22 proceedings in the case that the movant is not entitled to relief”) (quoting Rule 4(b)
23 of Rules Governing Section 2255 Proceedings). Defendant’s contention that the
24 Court calculated his sentence using the wrong base offense level under the version
25 of § 2D1.1(c) that existed at the time of his sentencing relies on essentially the
26 same argument as the one already rejected above. Contrary to Defendant’s
27 argument, based on the plea agreement’s stipulated drug quantity of “at least 150
28 grams of methamphetamine (actual),” the correct base offense level under the

1 version of § 2D1.1(c) that existed at the time Defendant was sentenced was base
2 offense level 34, which is the base offense level the Court applied. See U.S.S.G.
3 § 2D1.1(c)(3) (Nov. 1, 2010). Accordingly, there was no sentencing error.

4 In short, construing Defendant's motion under § 2255 would not help him
5 "avoid unnecessary dismissal." Castro, 540 U.S. at 381. To the contrary, it would
6 unnecessarily consume one of his limited opportunities to pursue habeas relief.
7 Therefore, the Court will refrain from undergoing the procedural steps required to
8 formally recharacterize Defendant's motion as a § 2255 motion.

9 As a final matter, Defendant requests appointment of counsel to
10 "[i]nvestigate [the] above stated [m]iscalculation." The right to appointment of
11 counsel does not extend to motions pursuant to 18 U.S.C. § 3582. See United
12 States v. Townsend, 98 F.3d 510, 512-13 (9th Cir. 1996). Defendant's request is
13 denied.

14 **III. CONCLUSION AND ORDER**

15 For the reasons above, Defendant's motion for reduction of sentence is
16 DENIED.

17 **IT IS SO ORDERED.**

18 Dated: February 10, 2017

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20 Barry Ted Moskowitz, Chief Judge
21 United States District Court

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